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ABSTRACT

This memorandum presents specific legislative proposals concerning the American Association of University Professor's policy on the representation of economic interests in public colleges and universities. Part I surveys legal principles reflected in the National Labor Relations Act and in state analogues. Part II reviews several recent legal enactments governing the representation of individuals engaged in public employment generally. Part III sets forth provisions for incorporation into proposed public employment legislation that would better suit the peculiar traditions, interests and needs of faculty members in higher education institutions. (JS)

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TO: Bertram H. Davis, General Secretary, American Association of University Professors
FROM: Robert A. Gorman
RE: Statutory Responses to Collective Bargaining in Institutions of Higher Learning

The Association has formulated a policy on university government and on the representation of economic interests in institutions of higher education. It has also been resolved that steps be taken in the form of legislation in order best to effectuate Association policy. At present, it seems most feasible to address our attention to legislation dealing with public, tax-supported educational institutions to the exclusion of private institutions, where professional negotiations have been traditionally unregulated by law. The purpose of this memorandum is to set forth specific legislative proposals in furtherance of Association policy.

Part I of this memorandum surveys the legal principles reflected in the National Labor Relations Act (NLRA) and in state analogues. Part II surveys several recent legal enactments governing the representation of individuals engaged in public employment generally. Part III sets forth specific instances in which general public-employment legislation may be expressly tailored so as better to suit the peculiar traditions, interests and needs of faculty members in institutions of higher learning.

I.

The central theme of the NLRA is that "employees shall have the right ... to bargain collectively through representatives of their own choosing." Virtually the entire statute (for present purposes) may be regarded as an elaboration of this proposition. The central themes are these, which I will discuss in turn:

1) The duty to bargain collectively.
2) The concept of exclusive representation.
3) Resolution of disputes over the establishment of collective bargaining and the selection of representatives.
4) Protection against employer coercion.
5) The right to engage in concerted activities.
6) Establishment of machinery to resolve disputes.

The duty to bargain. The statute defines the duty to bargain collectively as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment,

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> or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Thus the employer must not only meet and negotiate with the representative of his employees, but must be willing, should agreement on terms be reached, to enter into an agreement with respect to them. An employer may not agree simply to "consult" with employee representatives with respect to its policy, refusing as a matter of principle to enter into bilateral agreements. This duty extends to any subject embraced within the concept of a "condition of employment." It would certainly cover matters involving eligibility for employment, compensation, working conditions, promotion, fringe benefits, job security and tenure, retirement policies. Beyond these, the scope of the concept is flexible, and has in recent years been gradually expanded by the National Labor Relations Board, which has generally taken the view that any matter which has a fairly direct impact on job opportunities, pay or conditions of work is within the scope of required bargaining. Some courts view this as too broad, and would not require bargaining as to matters which are thought to be peculiarly sensitive concerns of management, e.g., pricing policies, plant location, etc.

It is misleading, however, to think that the Act mandates contractual specifications of every matter embraced within the term, condition of employment. It is important to bear in mind that, although there is a duty to bargain on demand over every such subject, it is itself a matter for bargaining whether and how much discretion is actually taken from the employer by the contract. An employer would be perfectly free to insist that a particular subject remain outside contractual specification, and indeed that the contract so state, provided that it was willing to discuss the matter with employee representatives. Thus the actual allocation of areas of joint and sole control is not prescribed by the statute, but is to be determined through the bargaining process itself. Failure to keep this central fact in mind produces a picture of the required scheme of collective bargaining which is far less flexible than the realities warrant.

The duty to bargain implies a further duty to provide the representative with relevant information regarding wage patterns and other conditions of employment, in sufficiently specific form that the representative can bargain intelligently on the matter. An employer would not be able simply to say that wages were confidential, or to provide minimum and maximum figures only. It would not be necessary to supply every individual's wages, but enough would have to be given to disclose the rules by which individual salaries were computed, or the number of persons at each level.

Second, there is also a duty not to act unilaterally -- that is, without notice to the representative and an opportunity to bargain -- when making changes in conditions of employment. For example, an employer could not introduce changes in the insurance scheme without giving prior notice to the representative and an opportunity to discuss any suggestions it might have. I think that these aspects of the duty to bargain -- the duty to provide information and to refrain from unilateral action -- may be of greater practical import than the obligation to meet and confer.

Exclusive representation. The concept of exclusive representation is central to our federal labor policy, and it should be recognized that any attack on it would most likely raise a major ideological issue. It was developed in response to the experience that, so long as a union represented only its members and not the entire bargaining unit, stable labor relations were impossible. Rival organizations vying for employee support would attempt to secure more favorable employer responses to their demands than those achieved by the majority representative, and an employer could strengthen or erode a particular union's support by his response to demands sponsored by that organization. By a similar attitude, he could show employees that they were better off outside than within the union. The law has therefore always required that an agreement reached with the majority representative apply to all, and enjoined the employer not to bargain with any other organization than the majority representative. This principle is limited by the notion that:

> any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect [and] the bargaining representative has been given opportunity to be present at such adjustment.

So if, for example, an employee is discharged, he can deal directly with his employer, without seeking union sponsorship, with respect to his "grievance." The distinction between a grievance and collective bargaining is not as clear as might first appear, however, and generally this proviso is applicable only to issues affecting one or a few people and (typically) raising issues of fact rather than questions of policy or contract interpretation in which the group generally would have a stake. Beyond that, it is generally agreed that, even as to an issue which is a "grievance," an employer may not deal with a rival union representing an individual employee, but only with the individual.

Establishment of collective bargaining; the selection of representatives. Collective bargaining is instituted on the theory that a majority of the employees in a particular bargaining unit desire it.

It may be inaugurated in one of three ways. First, an employer might simply agree to recognize an organization as the representative of its employees, and bargain with it as such. (This is lawful, although a challenge can be made if it can be proven that the organization lacked majority support.) In practice, this means of establishing collective bargaining occurs only where the employer is receptive or the union has strategically placed economic power. Second, a union which has obtained membership or authorization cards from a majority of the employees, but does not wish to participate in an election campaign, may demand recognition and charge the employer with an unlawful refusal to bargain if recognition is denied. There is no absolute right to insist on an election, the third method, but the law is not wholly clear on this point.

When the selection of a representative is to be by election, the statute provides machinery for polling the employees, embodying several relevant principles. First, employees are permitted to utilize representatives "of their own choosing." They may bargain through a company-wide or "independent" union, that is, one limited to employees of a particular employer, but they are not required to. They may choose a local, state-wide, national or international organization. The reason for this is the deeply-held belief that employees of a particular employer are for the most part unable to represent themselves adequately. This is partly because an employer is often reluctant to establish a pay structure markedly different from others in the same industry or field (whether they compete in the product market or not), partly because employees organizing for the first time usually lack the expertise needed to develop and present a bargaining position, partly because employees do not have the time to bargain with administrators or managers, partly because a more inclusive group may have more economic or political power. This is not to say that employees never choose a company-wide or independent union to represent them, but the choice is theirs. Similarly, they may ordinarily choose to affiliate with an organization specializing in a particular craft, trade or profession, or one organized on industry-wide lines. No qualifications with respect to internal organization, ideological or other attitudes, or financial structure are relevant at this stage. The question whether a particular mode of organization serves the interests of the employees involved is resolved by them and not by the legislature.

Second, there is the notion that the unit for elections must be appropriate for bargaining, and one of the central functions of the NLRB is to decide, if there is controversy, what the unit should be. (The federal act contains a specific provision that professional employees may not be included in a unit containing non-professionals unless the professionals vote separately for such inclusion.) Finally, the principle has been established that an election should be available periodically,

general pattern has been to lay down rules applicable to all employers subject to the board's jurisdiction rather than to attempt to take account of asserted industry or geographic variants.

II.

The federal labor statute expressly excludes from its coverage "the United States or any wholly owned Government corporation ... or any State or political subdivision thereof." Many states have enacted labor legislation based upon the federal model, but it too has for the most part been limited to private employment. The irony of denying to government employees those protections and benefits which have been legislatively declared as indispensable to labor peace in the private sector has not gone unnoticed, and in recent years there have been a number of legislative proposals and enactments extending collective bargaining into public employment (e.g., Connecticut, Massachusetts, Michigan, New York, Oregon, Washington, Wisconsin). Although some states continue expressly to bar organization among public employees for purposes of negotiating terms and conditions of employment, and at least one state declares it a crime, there is every reason to believe that an increasing number of states will enact more liberal labor legislation covering public employees. If recent public employment statutes are any indication, that legislation will be based on the federal model just discussed. There are, however, common deviations from that model which are thought appropriate in the context of public employment. This section of the memorandum will be devoted to a brief discussion of those differences.

The differences stem from at least three attributes of the government as employer, as contrasted to the private employer: (a) a work stoppage by public employees is likely to have a more direct impact upon the health, safety and convenience of the public; (b) the power of a state agency to agree on terms of employment must always be limited by the willingness and ability of the legislature to meet those terms (most obviously, by its power to lay taxes and allocate the proceeds); (c) government is normally obliged to hear all those who petition for redress of grievances.

The most significant deviation from the private-employment model is the widespread statutory proscription upon the right of public employees to engage in a strike or other form of work stoppage. Beyond the mere proscription, and the statement of penalties for its violation, it is not uncommon for a statute to provide that no employee organization may serve as a representative in collective bargaining unless it affirmatively renounces the right to strike and declares that it will not assist or participate in any such strike. The outlawing of the strike is understood to apply to any concerted withholding of services by present employees (probably including the solicitation of mass resignations), but should not

should a substantial number of employees desire it, so that a choice once made is not irrevocable. Generally, the decision taken at an election may be reviewed at another so long as a year has gone by, except that if a representative has been chosen, and a contract signed, the contract will forestall an election for a reasonable period of time (presently three years) until its expiration. The parties may not, through renewal of the agreement, pre-empt a desire to take a new poll.

Protection against coercion. Labor relations statutes typically attempt to insulate employees from the economic power of their employer in the event they seek representation through an organization of their own choosing. Most common are prohibitions upon retaliatory discharges or other discrimination in employment, or threats of such action. There is a corollary prohibition against union pressures upon employees who would refrain from exercising the right of organization: intimidation and coercion are barred on the part of union and employer alike, and unions are commonly prohibited from urging an employer to invoke work-connected sanctions against employees with tepid union allegiances. A further safeguard of free employee choice is a proscription upon an employer's creation or domination (usually understood to include most forms of financial support) of any particular employee organization, the familiar ban upon the "company union."

Concerted activities. The national act, and the state statutes applicable to private employees, guarantee the right to engage in concerted activities, that is, to strike, picket and boycott, in support of employee or union demands. This is thought to be a corollary to the duty to bargain, on the theory that employees must have some sanction to back up their demands if bargaining is not to be simply a charade. (The notion has been almost universally rejected in the area of public employment, where strikes are generally unlawful.)

Dispute-settling machinery. It is important to advert to one additional aspect of the law, which although virtually compelled by the others, may well itself be a source of much of an employer's potential concern over the prospect of coverage by the act. In order to enforce the several rights and duties imposed, and to administer the election process, an administrative agency was created. The jurisdiction of the NLRB (and state counterparts) may be invoked by any interested person, and the adverse party is required, on pain of permitting a potentially enforceable decision to go by default, to appear and defend. The agency may subpoena witnesses and documents, generally inquire into the facts involving any claim of violation, resolve disputes over interpretation of the statute, and issue orders which are enforceable in court. The pattern has been to have a single agency administer the act, rather than to attempt to set up industry-wide boards. Except in the area of defining appropriate units for the purpose of holding election, the

apply to such practices as the AAUP publication of a list of censured administrations or to advise about working conditions aimed particularly at prospective employees. A variety of other substitute devices have been employed, but generally where strikes are forbidden and the prohibition is enforced, the actual substitute (if any) is political pressure.

It has often been said that the strike is a necessary concomitant of collective bargaining, on the theory that the employer will be under no real pressure to come to terms with the employee representative unless he fears the strike as an ultimate weapon. The soundness of this theory is suspect, especially in the context of public employment, where the employer is effectively denied the use of the lockout, the analogue of the strike. In any event, there is little doubt that a ban upon the strike dictates the creation of other means, not commonly used in the private sector, to facilitate compromise in the negotiating process. It is accordingly a characteristic of public-employment legislation that disputes in the process of contract negotiation are submitted to some impartial third party, either an existing government mediation agency or one especially created to resolve public-employee disputes generally or the particular dispute in question. The usual procedure is first to encourage resort to a third party for purposes simply of mediation, i.e., hearing each side, relaying information, informally suggesting changes in position. Should mediation fail, it is common to provide for the more formal step of fact-finding and perhaps nonbinding recommendations for a fair settlement. Continued deadlock, which is likely to be rare, may have to be resolved ultimately by the legislature, with the right of presentation afforded the employee representative. Binding arbitration by a third party is apparently nowhere adopted, presumably in part because of the fear that this would constitute an improper delegation of legislative power.

Many states, in imposing a duty upon the public employer to enter into meaningful negotiations with employee representatives, borrow the federal expression "terms and conditions of employment" to describe the contours of that duty. Other legislation, however, apparently more jealous of the special status of the employer, expressly limits the duty to bargain either by specifically enumerating the subjects of bargaining or by specifically excluding therefrom the subjects which are to be retained as "management rights," i.e., subjects which are within the sole discretion and control of the public employer. The Wisconsin State Employment Labor Relations Act (effective January 1967), for example, does both: it reserves to the state employer the right, among other things, to "manage the employees of the agency; to hire, promote, transfer, assign or retain employees in positions within the agency and in that regard to establish reasonable work rules ... suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause ...," and it declares the following matters, among others, as subject to collective bargaining: "grievance procedures, ... work schedules relating to assigned hours and days of the week ... scheduling of vacations and other time off

... health and safety practices ...." The Presidential Executive Order No. 10988, promulgated by President Kennedy in 1961 and officially extending for the first time to all federal employees the right to organize and to bargain collectively, provides that the obligation to bargain "shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work."

In addition to outlawing the strike, providing for third-party resolution of contract-negotiation disputes and expressly confining the subjects of collective bargaining, some public-employee enactments deviate (in the direction of liberalization) from the federal NLRA model on the issue of grievance resolution. Grievances, or disputes regarding the application or interpretation of terms of an existing labor agreement, are normally resolved in the manner specified in the agreement itself, with the individual grievant being represented by the exclusive bargaining representative. As noted earlier, the federal statute limits the power of that representative by the express proviso that the individual "shall have the right at any time to present grievances to [the] employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." State legislatures, no doubt recognizing the special right of any individual or group to petition the government for redress of grievances, have written a similar proviso into their public-employment statutes. Indeed, the Kennedy Executive Order expressly provides that recognition of an employee organization as representative "shall not preclude any employee, regardless of employee organization membership, from bringing matters of personal concern to the attention of appropriate officials in accordance with applicable law ... or from choosing his own representative in a grievance or appellate action ...." Thus, an agrieved federal employee represented by an organization other than the exclusive employee representative may process his grievance under the guidance of officials of his "minority" organization, a practice which is improper under the NLRA. And, while the federal statute permits the exclusive representative "to be present" at the "adjustment" of the grievance, at least one state provides that the exclusive representative of its public employees shall be given no more than "prompt notice" of the grievance settlement.

It should be noted, finally, that the Kennedy Executive Order expressly saves the right of the employing federal agency to consult with associations other than the exclusive representative not simply on individual grievances but also on broader questions of employment policy -- questions which, under the NLRA, would be treated as "terms and conditions of employment" and therefore within the exclusive province of the majority representative. Thus, the Order expressly provides that a representative of even a small minority of employees in a bargaining unit "shall, to the extent consistent with the efficient and orderly conduct of the public

business, be permitted to present to appropriate officials its views on matters of concern to its members"; and further provides that a federal agency shall not be precluded "from consulting or dealing with any religious, social, fraternal, or other lawful association, not qualified as an employee organization" on matters involving members of the association, appending the ambiguous proviso that "such consultations or dealings [be] duly limited so as not to assume the character of formal consultation on matters of general employee-management policy ...."

III.

It is not likely, at least in the foreseeable future, that any state will enact legislation dealing specifically with the representation of economic interests in institutions of higher learning. It is even less likely that any state will expressly direct that faculty representation in public institutions of learning take the form outlined in the AAUP Statement on Government of Colleges and Universities, i.e., faculty senates or councils serving as the basis of shared authority on questions of educational policy. In short, it is practical to believe that the aims of the Association in preserving faculty strength and independence and in assuring the continuance of the traditional role of the AAUP will be effectuated in the legislative sphere (a) by supporting proposed legislation authorizing the free selection by public employees of representatives for purposes of advancing their economic interests, and (b) by urging in addition special provisions or amendments in such legislation designed better to respond to the peculiar needs of faculty members in institutions of higher learning. It is the purpose of this section of the memorandum to discuss briefly those specific provisions which might be incorporated in proposed public-employment legislation. Depending upon the terms already incorporated in such proposed legislation, and the special concerns of higher education in particular local settings, all of the following propositions (or some variation thereof) should be considered.

(1) The Strike in Academic Situations. [A Special Committee on Representation, Bargaining and Sanctions expects to present to the Council at its April 25, 28, 1968 meeting recommendations regarding the Association position on the strike in academic situations.]

(2) Nonexclusive Representation. If the prevailing model of exclusive representation by the majority bargaining agent is extended to institutions of higher learning, the AAUP goal of shared authority in university government may well be jeopardized. So too may many of the Association's traditional functions; for its involvement in matters of salary and tenure partakes of the kind of representation on terms and conditions of employment which is within the domain of the exclusive representative. To preserve these AAUP goals and activities from legislative pre-emption, two approaches are possible: (a) provision for nonexclusive representation, or (b) provision for exclusive representation but preservation of the role of minority organizations on specified

matters of professional interest. The selection between these two approaches will depend upon the professional needs and the political realities in a particular jurisdiction at a particular time. They are discussed in this and the following sections.

Nonexclusive representation can take one of two forms. The public employer might be required to engage in separate consultation and negotiation with each of a number of faculty representatives and separate agreements would control the relationships between the employer and the members of each organization. The obviously burdensome and divisive nature of this arrangement is not likely to commend it as the required norm for collective bargaining. A more appealing and feasible form of nonexclusive representation is that of the joint negotiating council, the membership of which is apportioned among the various professional organizations according to the number of their members within the unit. It is this model of the negotiating council which has been enacted into law in the California public school system. The California statute affords the teacher the option of representation either individually or through an organization, and imposes an obligation upon the public employer to negotiate with an employee organization or with a joint council (comprised of no less than five or more than nine members) should there be more than one such organization. Were such a form of nonexclusive representation adopted in any institution of higher learning, the AAUP representatives on the council would presumably have to arrive at some common agreement with the representatives of the other organizations before dealing with the administration.

(3) Exclusive Representation, with Senate as Qualified Employee Representative. In the several states which have recently enacted public-employment legislation, the thrust toward the federal model of exclusive representation has been strong.* (The Kennedy Executive Order contemplates a modified form of exclusive representation, while the New York Taylor Act has left the question of exclusive representation to the newly created Public Employment Relations Board.) Where exclusive representation does prevail, every effort should be made, first, to assure any faculty senate of a continued role as professional representative and, second, to preserve the historic role of the AAUP in matters of broad concern to the academic profession.

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*Even if state legislatures continue in the future to adopt this model, it might be possible to urge that an express exception be made for public institutions of higher learning which, because of the nature and traditions of such institutions, would be empowered to conduct professional negotiations on a nonexclusive basis. Alternatively, the decision whether to adopt the principle of exclusivity in specific types of employment might be left with the administering agency; this is in effect what has been done in New York.

The first goal can in large measure be achieved by providing that faculty members in the bargaining unit may select their senate as the exclusive bargaining representative. Were faculty selection limited to "outside" organizations, such as a teachers' union, it would be almost inevitable that many of the functions traditionally served by the senate would be pre-empted by the exclusive representative, and the power and effectiveness of the senate crippled. Most statutes extend to public employees the power to organize and bargain through "any lawful association or labor organization having as a primary purpose the improvement of wages, hours and other conditions of employment among public employees" (or some similar definition). Although it should be clear, even without further legislative delineation, that a faculty senate is such an "association," and would thus properly be named on a ballot in the event of an election for exclusive representative, an express statement to that effect in the legislation is desirable.

Of course, it is important to assure that a senate seeking to serve as faculty representative on matters of economic and educational concern is qualified to do so by its independence of the administration. Any labor board responsible for admitting an organization to a position on a ballot and for certifying it as exclusive representative is only reasonable in seeking assurances that it is not so dominated by an administration as to be, in effect, a "company union." It might be argued that the support with public moneys of the activities of a college or university senate (e.g. for office space, secretarial assistance, etc.) should disqualify it from serving as exclusive faculty representative. It should be obvious that this public financial support should not by itself dictate such disqualification. But it may be necessary to urge that some explicit qualifications for a faculty senate, as a guarantee of its independence, be embodied either in legislation or in the regulations which govern the agency responsible for administering that legislation. Such a provision might empower the board to certify (or the university administration to recognize without an election) as exclusive bargaining representative "a faculty senate or other representative council which is composed of members of the faculty elected by the members of the faculty;* and no such senate or council shall be rendered ineligible for recognition or certification merely because its activities are supported by public moneys." A simpler formulation would save the faculty senate or council from disqualification "if the board finds that the association will in its practical operations be independent of the administration."

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*Academic institutions which have traditionally included full-time administrative personnel in the membership of the senate might be forced, under this suggested formulation, to revise the criteria for membership or for the selection of officers or committee members. A practical solution for a senate which has mixed administrative-faculty membership would be to restrict the consideration of bargainable matters to its faculty members.

Should the senate be lawfully recognized or elected as exclusive bargaining representative it will be in a position to negotiate with the administration for continued public financial support. Agreement to such support will eliminate the need for the senate to turn to its own membership for dues, the usual method for meeting the expenses of a bargaining representative.

(4) Preservation of the Right of Petition. In any state which adopts the model of exclusive representation for public employees, it is important that the general right of all to petition the government be preserved, and more particularly, that the governing legislation be fashioned so as best to preserve the historic role of the Association in matters of broad concern to the academic profession, such as economic well-being and standards of academic freedom and tenure. Accordingly, any legislation endorsing the principle of exclusivity should include a proviso along the following lines: "Exclusive recognition shall not preclude any individual or group of individuals or any lawful organization from offering information or presenting its views or petitioning for redress of its grievances to the appropriate officials in charge of any public institution of higher learning." (Of course, if such specificity is impolitic, the last phrase may be eliminated.)

[It bears repeating at this point that merely because a statute compels an administration to negotiate "terms and conditions of employment," which may include such matters as general standards of academic freedom and tenure, that does not mean that such standards will be subject throughout the contract term to joint resolution on the demand of the majority representative. Indeed, such a statute would make lawful an insistence by the university administration, in the course of negotiations with the majority representative, that such standards are to be governed during the term of the agreement by a faculty body (such as a senate) which is independent of both the administration and the majority representative, should that representative be an "outside" organization.]

(5) Individual Settlement of Grievances. A proviso such as that just suggested, while designed primarily to undercut the exclusive control of the majority representative over questions of policy relevant at the negotiating phase, will also have ramifications at the later phase of contract administration, more particularly in grievance proceedings. It would be wise, however, in view of the pervasiveness of the federal model, to urge a proviso expressly directed to the question of individual rights in the grievance-settlement process. This purpose might best be achieved, and some ambiguities in the federal statute eliminated, by a provision in these terms: "Any individual employee or group of employees shall have the right at any time, either personally or through a representative of their own choosing, to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, and the employer shall have the duty to hear such grievances and participate in such adjustment; provided the adjustment

shall not be inconsistent with the terms of a collective bargaining agreement then in effect, and provided further that prompt notice of such adjustment shall be given the employee organization certified or recognized as the exclusive representative." Such a provision will make it clear that the administration of any university is not simply permitted to adjust grievances with others than the exclusive representative but is obligated to do so; that an aggrieved faculty member is free to select an organization such as the AAUP as his representative in grievance proceedings, when it is not the exclusive representative; and that such exclusive representative is not necessarily to be present at or participate in the grievance adjustment but need merely be notified of its outcome.

(6) No Compulsory Membership in the Majority Organization. Related to the issue just discussed is that of the propriety of the "union shop" and the "agency shop" in public institutions of higher learning. An employee is required in the union shop to become a member of the majority union, such membership being a condition of continued employment; in the agency shop, all employees are required merely to pay to the union dues to defray the expenses incurred in acting as his collective bargaining representative. The AAUP is cpposed to compulsory membership in any professional organization; it might, however, wish to leave open the possibility of turning to all teachers in the unit for financial support for any enhanced responsibilities should it become exclusive representative. Both principles could be secured by providing in the governing legislation (as is commonly done, the following language being taken from the New York Taylor Act) that: "Public employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing." This language should serve to bar the union shop, but is silent on the agency shop, which would then become a subject for collective negotiation.

(7) Faculty Members as Separate Bargaining Unit. One of the most significant tasks of any agency appointed to administer a labor-relations statute is that of determining the appropriate bargaining unit, i.e., that group of employees (more accurately, of job positions) who will select the bargaining representative and for whom that representative will speak in negotiations over terms and conditions of employment. Employees falling outside the unit may continue to negotiate individually or through some other representative. Perhaps the most important factor to be considered in determining the scope of the unit is the homogeneity of interests among the employees concerned. For this reason, the bargaining unit in institutions of higher education should be comprised solely of "members of the faculty," with administrative and clerical personnel excluded. Legislation should expressly provide: "In institutions of higher learning, the members of the faculty shall constitute a separate unit for purposes of collective bargaining." The determination in specific cases whether an individual is or is not a "member of the faculty" is to be made by the

agency charged with the administration of the statute. In states where this directive is not expressly incorporated in the legislation, the appropriateness of faculty members as a distinct bargaining unit should be urged directly upon the administrative agency.

(8) Specialized Administrative Board. Many of the decisions to be made by any agency charged with administering a labor-relations statute must obviously be informed by a special familiarity with the traditions, interests and needs of the employees in question. Some states, in enacting legislation governing all public employees, have reposed administrative authority in an already existing state labor relations board, accustomed to dealing with labor-management relations in private industry. Some states have created a special agency with authority limited to the field of public employment. Obviously, the latter alternative is to be preferred. Wherever possible, an effort should be made to refine the scope of power even further, so as better to service the peculiar demands of the professional engaged in higher education. Priority should be attached to the creation of an administrative tribunal charged with resolving representation and negotiation disputes in public institutions of higher learning. Failing that, support should be encouraged for an agency charged with the resolution of such disputes in all public institutions of education at all levels.

(9) Expanded Subject Matter of Bargaining. The Statement on Government of Colleges and Universities provides for faculty participation in decisions regarding such matters as the selection of the president of the institution and of other academic officers, the direction of general educational policy and the expenditure of funds that are allocated to education and research. In short, the faculty ought to be (and traditionally has been) a partner in the determination of matters which, in private industry, would undoubtedly be viewed as among the prerogatives of management. For this reason, among others, the legal framework tailored for industrial unionism would be retrogressive if implanted wholesale in institutions of higher learning.

It is perhaps equally important to preserve faculty authority on these broader questions of educational and research policy from intrusion by any "outside" organization selected as bargaining representative as it is to preserve it against administrative fiat. Ideally, a statute might be envisioned which would repose such authority in a faculty senate while restricting the authority of the outside representative to hard-core economic matters. It is, however, difficult if not impossible to strike upon a satisfactory statutory formulation of the respective spheres of interest of senate and bargaining agent. Which organization, for example, would be empowered exclusively to represent the faculty on questions of tenure, retirement, teaching load, class size, vacations and class schedules?

The most feasible solution to the problem of preserved faculty authority is to support the broad and typical provision requiring collective

bargaining on all "terms and conditions of employment." In light of the nature and traditions of institutions of higher learning, this phrase should be understood to include matters of educational and research policy. Once both the administration and the bargaining representative confront these matters in the course of contract negotiation, the administration may bargain for reserved control -- reserved not for the administration but rather for the faculty senate. The adjustment between "educational policy" and "money matters" would be made for each particular institution in the course of professional negotiations.

As noted earlier, some statutes governing collective bargaining in public employment have placed specific restrictions upon the terms and conditions subject to mandatory bargaining. The mere fact that legal limitations might properly be imposed upon the negotiating authority of those representing policemen, firemen and transit workers does not compel the adoption of similar limitations upon faculty spokesmen in colleges and universities. Accordingly, such express provisions (or, the other side of the coin, express reservation of rights for the public employer) should be strongly combatted. At the least, every effort should be made to have them declared inapplicable to public institutions of higher learning.